

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA STATE OUTDOOR  
ADVERTISING ASSOCIATION, INC.,  
a California corporation, et  
al.,

NO. CIV. S-05-0599 FCD/DAD

Plaintiffs,

V.

MEMORANDUM AND ORDER

STATE OF CALIFORNIA,  
DEPARTMENT OF TRANSPORTATION,  
WILL KEMPTON, in his official  
capacity as Director,  
CALIFORNIA DEPARTMENT OF  
TRANSPORTATION, and DOES 1-50  
inclusive.

## Defendants.

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24 This matter is before the court on motion for partial  
25 summary judgment filed by defendants State of California  
26 Department of Transportation and Will Kempton, Director of the  
27 California Department of Transportation (collectively  
28 "Caltrans"), and motion for partial summary judgment filed by

1 plaintiffs, California Outdoor Advertising Association, Inc., and  
2 its members, Arcturus Outdoor Advertising, Bulletin Displays,  
3 LLC, Clear Channel Outdoor, Inc., Fairway Outdoor Advertising,  
4 Inc., Edwards Outdoor Signs, General Outdoor Advertising, Inc.,  
5 Heywood Company Outdoor, James N. Hoff doing business as Hoff  
6 Outdoor Advertising, Hunter Media, Lamar Central Outdoor, Inc.,  
7 J. R. Zukin Corporation doing business as Meadow Outdoor  
8 Advertising, Sun Outdoor Advertising, Stott Outdoor Advertising,  
9 Titan Advertising, United Outdoor Advertising, Van Wagner  
10 Communications, Inc., and Viacom Outdoor, Inc. (collectively  
11 "CSOAA"). The court held a hearing on the motions August 26,  
12 2005.<sup>1,2</sup>

13 After considering the memoranda filed by the parties and  
14 arguments made by counsel at the hearing, and for the reasons  
15 stated herein, the court GRANTS plaintiff's motion for summary  
16 judgment and DENIES defendants motion for summary judgment.

17 **BACKGROUND**

18 Caltrans, a department of the State of California, regulates  
19 outdoor advertising pursuant to the Outdoor Advertising Act,  
20 California Business & Professions Code § 5200 et seq. ("OAA") and  
21 regulations promulgated by Caltrans pursuant to the OAA. (Defs.'  
22 Response to Pls.' Sep. Statement of Und. Facts ("RUF") ¶ 5.)

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24 <sup>1</sup> Because oral argument will not be of material  
assistance, the court orders the matter submitted on the briefs.  
25 E.D. Cal. Local Rule 78-230.

26 <sup>2</sup> The court strikes from the record the Surreply and  
27 objections to certain declarations submitted by defendants  
28 (docket numbers 28 and 29) filed by plaintiffs on August 22, 2005  
as improper and untimely under the Eastern District Local Rule  
78-230.

1       The OAA requires that any person operating an outdoor  
2 advertising display in California referred to herein as "sign" or  
3 "billboard") obtain a permit ("Billboard permit") issued by the  
4 director of Caltrans or his authorized agent, which must be  
5 renewed every five years. Cal Bus. & Prof. Code §§ 5350,  
6 5360(a); RUF ¶ 7. Prior to January 1, 2003, the fee for  
7 obtaining a Billboard permit was set by statute, California  
8 Business and Professions Code section 5485(a), at \$20.00 per year  
9 for each billboard. (RUF ¶ 8.) Under regulations effective in  
10 2002, billboard operators were required to pay the annual \$20.00  
11 permit fee for 2003 on or before December 31, 2002. (RUF ¶ 10.)

12       Effective January 1, 2003, the Legislature amended section  
13 5485(a), which now provides that the Director of Caltrans shall  
14 set the Billboard permit fee:

- 15       (a) (1) The annual permit fee for each advertising  
display shall be set by the director.
- 16       (2) The fee shall not exceed the amount reasonably  
necessary to recover the cost of providing the service  
or enforcing the regulations for which the fee is  
charged, but in no event shall the fee exceed one  
hundred dollars (\$100). This maximum fee shall be  
increased in the 2007-08 fiscal year and in the 2012-13  
fiscal year by an amount equal to the increase in the  
California Consumer Price Index.
- 17       (3) The fee may reflect the department's average cost,  
including the indirect costs, of providing the service  
or enforcing the regulations.

22 Cal. Bus. & Prof. Code § 5485(a).

23       On or about June 2, 2003, Caltrans announced a new annual  
24 permit renewal fee of \$92.00, which Caltrans indicated it  
25 promulgated pursuant to newly-amended section 5485(a). At or  
26 around the same time, Caltrans notified permit holders that they

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1 were required to pay within thirty days<sup>3</sup> an additional \$72.00 per  
2 billboard for their 2003 permits or the permits would be revoked  
3 pursuant to California Business and Professions Code § 5463 .<sup>4</sup>  
4 (RUF ¶ 11.)

5 In setting the new Billboard permit fee, Caltrans did not  
6 follow the rulemaking provisions of the Administrative Procedures  
7 Act, California Government Code section 11340, et seq. ("APA").  
8 According to Caltrans, setting of the Billboard permit fee falls  
9 within an exception to the APA for "regulations establishing  
10 rates, prices or tariffs." Cal. Gov't Code § 11340.9(g); RUF ¶¶  
11 8.)

12 Instead, Caltrans calculated the new Billboard permit fee by  
13 "taking the total costs of its Outdoor Advertising  
14 Program ("ODA") of \$1,273,824.00 minus projected  
15 revenues of \$190,000.00 to give an annual net program  
16 cost of \$1,083,824.00. This net costs was divided by  
17 the number of permits, 11850, to give an annual permit  
cost of \$92.00. The breakdown of costs and revenues in  
arriving at the \$92 permit fee are provided in the ODA  
Expenditure Summary Data Sheet and related documents."  
(RUF ¶ 19; Caltrans' response to CSOAA's Interrogatory No. 1.)

18 Plaintiffs filed their original complaint with the Los  
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22       <sup>3</sup> According to Caltrans, it extended the thirty-day  
23 period to sixty days on July 17, 2003.

24       <sup>4</sup> California Business and Professions Code § 5463  
25 provides in relevant part: "The director may revoke any license  
26 or permit for the failure to comply with this chapter and may  
remove and destroy any advertising display placed or maintained  
27 in violation of this chapter after 30 days written notice is  
forwarded by mail to the permitholder at his or her last known  
address. If no permit has been issued, a copy of the notice shall  
be forwarded by mail to the display owner, property owner, or  
advertiser at his or her last known address."

1 Angeles County Superior Court.<sup>5</sup> On November 29, 2004, plaintiffs  
2 filed a First Amended Complaint asserting four claims: (1)  
3 violation of the APA; (2) violation of California Business and  
4 Professions code section 5485(a); (3) violation of Article I,  
5 §2(a) of the California Constitution protecting liberty of  
6 speech; and (4) against defendant Kempton only, a claim under 42  
7 U.S.C. § 1983 for violation of plaintiff's First Amendment  
8 rights.

9 On January 5, 2005, defendants removed the action to the  
10 United States District Court for the Central District of  
11 California. Defendants subsequently filed a motion for change of  
12 venue which was granted by order dated March 14, 2005. The case  
13 was transferred to this court on March 24, 2005.

14 On June 7, 2005 defendants filed a motion for partial  
15 summary judgment on plaintiffs' first claim for violation of the  
16 APA. On July 12, 2005 plaintiffs filed a cross motion for  
17 partial summary judgment as to the validity of the permit fee.

18 **STANDARD**

19 Pursuant to Rule 56 of the Federal Rules of Civil Procedure,  
20 summary judgment is appropriate when "there is no genuine issue  
21 as to any material fact and . . . the moving party is entitled to  
22 judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this  
23 standard, an issue is "genuine" if there is sufficient evidence  
24 for a reasonable jury to find for the nonmoving party and a fact  
25 is "material" when it may affect the outcome of the case under  
26 the substantive law that provides the claim or defense. Anderson

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27 <sup>5</sup> The court cannot locate in the file the date plaintiffs  
28 filed the original complaint.

1 v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The  
2 determination is made based solely upon admissible evidence. Orr  
3 v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).  
4 Furthermore, the court must view inferences made from the  
5 underlying facts in the light most favorable to the nonmoving  
6 party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

7 The moving party has the initial burden to demonstrate the  
8 absence of a genuine issue of material fact. Celotex Corp. v.  
9 Catrett, 477 U.S. 317, 323 (1986). If the moving party is  
10 without the ultimate burden of persuasion at trial, it may either  
11 produce evidence negating an essential element of the opposing  
12 party's claim, or demonstrate that the nonmoving party does not  
13 have enough evidence to carry its ultimate burden of persuasion  
14 at trial. Nissan Fire & Marine Insurance Co. v. Fritz Companies,  
15 Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party  
16 meets this initial requirement, the burden then shifts to the  
17 opposing party to go beyond the pleadings and set forth specific  
18 facts that establish a genuine issue of material fact remains for  
19 trial. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475  
20 U.S. 574, 585-87 (1986). Summary judgment should not be granted  
21 where "there are any genuine factual issues that properly can be  
22 resolved only by a finder of fact because they may reasonably be  
23 resolved in favor of either party." Anderson, 477 U.S. at 250.

24 Following this same rubric, a court may grant summary  
25 adjudication on part of a claim or defense, based on the  
26 standards applicable to a motion for summary judgment. See Fed.  
27 R. Civ. P. 56(a), (b); State of California v. Campbell, 138 F.3d  
28 772, 780 (9th Cir. 1998).

## ANALYSIS

## I. Violation of the APA

3 The sole question presented here is whether Caltrans was  
4 required to adhere to the procedural requirements of APA in  
5 setting the Billboard permit fee.<sup>6</sup> According to Caltrans, the  
6 APA's exemption for "regulations establishing rates, prices or  
7 tariffs" applies to the setting the Billboard permit fee. See  
8 Cal. Gov't Code § 11340.9(g). Plaintiffs dispute that the  
9 "rates, prices or tariffs" exception applies to the Billboard  
10 permit fee.

11        "The task of resolving the dispute over the meaning of [a  
12    statute] begins where all such inquiries must begin: with the  
13    language of the statute itself." United States v. Ron Pair  
14    Enters., Inc., 489 U.S. 235, 241 (1989); Chevron U.S.A. v.  
15    Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). The  
16    Supreme Court describes this rule as the "one, cardinal canon  
17    before all others." Connecticut Nat'l Bank v. Germain, 503 U.S.  
18    249, 253 (1992). Thus, "courts must presume that a legislature  
19    says in a statute what it means and means in a statute what it  
20    says there." Id. (citing, Ron Pair, 489 U.S. at 241-242; United  
21    States v. Goldenberg, 168 U.S. 95, 102-03 (1897). When the  
22    language of the statute is plain, the inquiry also ends with the  
23    language of the statute, for in such instances "the sole function  
24    of the courts is to enforce [the statute] according to its  
25    terms." Ron Pair, 489 U.S. at 241 (quoting Caminetti v. United  
26    States, 242 U.S. 470, 485 (1917)); Melahn v. Pennock Ins. Inc.,

6 Parties do not dispute that the permit fee is a  
28 "regulation" within the meaning of the APA.

1 965 F.2d 1497, 1502 (8th Cir. 1992) (plain meaning of a statute  
2 governs over ambiguous legislative history).

3 California Government Code section 11340.9(g) provides:<sup>7</sup>

4 This chapter does not apply to any of the  
5 following:  
6 . . .

7 (g) A regulation that establishes or fixes rates,  
8 prices, or tariffs. . . .

9 Initially, the court notes that the word "fee" is not used  
10 in the statute. Under the canon of construction, *expressio unius  
est exclusio alterius*, the mention of one thing in a statute  
11 impliedly excludes another. By including a list of exceptions  
12 for "rates", "prices" and "tariffs," the legislature implicitly  
13 excluded fees.

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14 <sup>7</sup> The other exceptions contained in section 11340.9 are:  
15 (a) An agency in the judicial or legislative branch of the state  
16 government.

17 (b) A legal ruling of counsel issued by the Franchise Tax Board  
18 or State Board of Equalization.

19 (c) A form prescribed by a state agency or any instructions  
20 relating to the use of the form, but this provision is not a  
21 limitation on any requirement that a regulation be adopted  
22 pursuant to this chapter when one is needed to implement the law  
23 under which the form is issued.

24 (d) A regulation that relates only to the internal management of  
25 the state agency.

26 (e) A regulation that establishes criteria or guidelines to be  
27 used by the staff of an agency in performing an audit,  
28 investigation, examination, [etc., which would disclose material  
to the violator and facilitate violation of the law].

(f) A regulation that embodies the only legally tenable  
interpretation of a provision of law.

(h) A regulation that relates to the use of public works,  
including streets and highways, when the effect of the regulation  
is indicated to the public by means of signs or signals or when  
the regulation determines uniform standards and specifications  
for official traffic control devices pursuant to Section 21400 of  
the Vehicle Code.

(I) A regulation that is directed to a specifically named person  
or to a group of persons and does not apply generally throughout  
the state.

1       The term "fee" is used extensively throughout the California  
2 code. In light of this ubiquitous term, it seems likely that  
3 the legislature would have expressly referenced "fees" within  
4 this statute had it intended the exemption to apply to fees.<sup>8</sup>  
5 Interestingly, in other statutes, the legislature did include  
6 both the terms "fees" and "rates", indicating that, when it  
7 intended to include fees, it the legislature expressly so  
8 provided. See e.g., Cal. Gov't Code § 6557 ("Said indenture may  
9 include covenants or other provisions relating to the bonds  
10 issued thereunder requiring the entity to fix, prescribe and  
11 collect *rates, tolls, fees, rentals* or other charges . . .  
12 . . .") (emphasis added); Cal. Educ. Code § 94147 ("The authority  
13 may fix, revise, charge, and collect *rates, rents, fees, and*  
14 charges for the use of and for the services furnished or to be  
15 furnished by each project . . .") (emphasis added).

16       Nor does the court agree with defendants' argument that the  
17 terms "fee" and "rate," or alternatively "fee" and "price" are  
18 synonymous. The common meanings of these terms are quite  
19 distinct.

20       Black's law dictionary defines "rate" as "proportional or  
21 relative value, measure or degree. The proportion or standard by  
22 which quantity or value is adjusted. . . . Amount of charge or  
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24       <sup>8</sup> In fact, the term "fee" appears in the same 1945  
25 statute (different section) that added the "rate or tariffs"  
26 exception to the APA. See Stats. 1945 c. 111 p. 445; Guarantee  
27 Title & Trust Co. v. Title Guaranty & Surety Co., 224 U.S. 152,  
159-160 (1912) (where different language is used in different  
parts of a statute, it is presumed that the language is used with  
a different intent); see also 73 AM. JUR. 2d Statutes § 131 (May,  
2005).

1 payment with reference to some basis of calculation. A certain  
2 quantity or amount of on thing considered in relation to another  
3 thing and used as standard or measure." Black's Law Dictionary  
4 at 1261 (Sixth Ed. 1990).

5 By contrast, a "fee" is defined as "a charge fixed by law  
6 for services of public officers or for use of a privilege under  
7 control of government." Black's Law Dictionary at 614. Unlike a  
8 rate, which is measured by reference to something else, a "fee"  
9 has a fixed value. A fee is \$20.00. A rate is \$20.00 per hour  
10 or \$30.00 per pound. A fee can be set by reference to a rate,  
11 but is not synonymous with the term rate.

12 Similarly, "fee" and "price" are not synonymous.<sup>9</sup> Price is  
13 defined as "the cost at which something is obtained. Something  
14 which one ordinarily accepts voluntarily in exchange for  
15 something else. The consideration given for the purchase of a  
16 thing. Amount which a prospective seller indicates as the sum  
17 for which he is willing to sell . . . The term may be synonymous  
18 with cost and with value as well as with consideration, though  
19 prices is not always identical either with consideration."  
20 Black's Law Dictionary at 1188-89.

21 Unlike "fee", which refers to the charge for a government  
22 privilege, i.e., a permit or license, "price" connotes a sale,  
23 purchase or commercial transaction. This connotation is apparent  
24 in the references to price setting in the code. See e.g., Cal.  
25 Food & Agric. Code § 62062 (authorizing Director of Department of  
26 Agriculture to set minimum milk prices); Cal. Educ. Code §

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27       <sup>9</sup> Defendants do not contend that the permit fee falls  
28 under the exception for "tariffs".

1 1249(a) ("The county superintendent of schools may sell  
2 publications that he or she produces. . . . The county  
3 superintendent of schools, . . . may fix the price . . . for the  
4 sale of any publication produced by him or her."); Cal. Fish & G.  
5 Code § 15301 ("The department may sell wild aquatic plants or  
6 animals, except rare, endangered, or fully protected species, for  
7 aquaculture use at a price approximating the administrative cost  
8 to the department for the collection or sale of the plants or  
9 animals. The commission shall set this price."); Cal. Gov. Code §  
10 9792 (authorizing Department of General Services to sell copies  
11 of laws, resolutions and journals "at such price as it may fix").

12 The court thus concludes that the plain meaning of the  
13 language in California Government Code section 11340.9(g)  
14 excludes fees from the exception. However, even if the language  
15 were ambiguous, the legislative history further supports the  
16 conclusion that the exception does not cover fees. When added to  
17 former Government code section 11380 in 1945, the exception  
18 listed only "rates or tariffs."<sup>10</sup> See Stats. 1945 c. 111 p. 445  
19 § 3 ("As used in this chapter: . . . (b) 'Regulation' includes  
20 any rule or regulation made by any state agency except one which:  
21 (2) establishes or fixes rates or tariffs."). In 1949, the  
22 legislature added the term "prices" to the section 11380,  
23 presumably because the terms "rates" and "tariffs" have unique  
24 definitions which do not encompass "prices". See Stats. 1949 c.

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25 <sup>10</sup> The earlier versions of this provision, originally  
26 codified as Government Code section 11380, provide no definition  
27 of the terms "rates," "prices" or "tariffs", nor did a search of  
28 archival documents reveal any explication of the terms or  
discussion of the purpose of the 1949 amendment. See Stats. 1949  
c. 313 § 2 p. 601.

1 313 § 2 p. 601. If the legislature felt compelled to add the  
2 word "prices" because "prices" were not encompassed within the  
3 terms "rates" and "tariffs," logic suggests that the terms  
4 "rates" and "tariffs" also do not encompass other different  
5 terms, such as "fees".

6 The court also notes that Caltrans has followed the  
7 Administrative Procedures Act when promulgating regulations  
8 establishing permit fees in other contexts.<sup>11</sup> plaintiff cites  
9 two examples where Caltrans itself followed the APA in setting  
10 fees. See 4 C.C.R. § 2424 (describing late renewal process and  
11 setting penalty fees); 21 C.C.R. § 2114 (establishing permit fees  
12 and other fees for placement of business names on roadside signs  
13 placed in rural areas to alert motorists to nearby services).  
14 In addition, plaintiffs identify numerous examples where other  
15 agencies established fees in conformity with the APA. See e.g.,  
16 2 C.C.R. § 2202(c)(2) (\$1.00 per acre permit fee for prospecting);  
17 10 C.C.R. § 2604.02(B) (\$35.00 application fee for pre-  
18 organization permit to organize insurance company; 10 C.C.R. §  
19 225 (fees relating to real estate appraisers); 14 C.C.R. § 13055  
20 (fees for processing permit applications for approval by coastal  
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22 <sup>11</sup> Caltrans and other agencies' conduct in setting other  
23 fees is of little relevance to the court's interpretation of the  
24 statute. From the materials provided by the parties, the court  
25 cannot conclude that agencies consistently establish fees in  
26 compliance with the APA. However, the court includes reference  
27 to the above cited examples to demonstrate an apparent  
28 inconsistency between Caltrans' position that fees fall within  
section 11340.9(g) exception and its own conduct in setting other  
fees in compliance with the APA, and also to defeat any  
suggestion that requiring agencies to comply with the APA in  
setting fees would place an undue burden on agencies, since it  
appears that at least in some instances agencies do comply with  
the APA in setting fees.

commission); 12 C.C.R. § 676(b)(9)(B) (\$200.00 permit fee for fallow deer farming).<sup>12</sup>

Defendant distinguishes these regulations on the ground that, unlike here, where the regulation involved solely the setting of a fee with statutory guidance provided by the legislature, these permit fees were part of a broader regulation adopting a process. However, defendants' argument ignores the statutory requirement that Caltrans adopt regulations establishing the *process* for permit renewal. California Business and Professions Code section 5630 provides:

(a) The director shall establish a permit renewal term of five years, which shall be reflected on the face of the permit. (b) The director shall adopt regulations for permit renewal that include procedures for late renewal within a period not to exceed one year from the date of permit expiration. Any permit that was not renewed after January 1, 1993, is deemed revoked.

Pursuant to that authority, Caltrans promulgated 4 C.C.R. § 2424, which sets forth the process for permit renewal and payment of the fee. While the statutory authority for setting the Billboard permit fee appears in a different code section, it is nonetheless part of a broader permit renewal process. Thus, it is indistinguishable from the other permit fees cited by plaintiff.

In support of its position that the permit fee falls within the "rates, prices and tariffs" exception, defendants rely on a 1961 California Court of Appeals case, Estate of Setzer, 192 Cal. App. 2d 634 (1961). Neither Setzer, nor any other reported case addresses whether "fees" fall within the "rates, prices or

<sup>12</sup> The court grants plaintiffs' request for judicial notice of the regulations cited.

1 tariffs" exception.<sup>13</sup> Setzer involved a challenge to rates fixed  
2 by the Director of Mental Hygiene for the maintenance of  
3 incompetent individuals in state hospitals. The conservator for  
4 an individual committed to a state hospital challenged the  
5 Director's increase in the rates for failure to comply with the  
6 APA. The district court upheld the rate increase and the  
7 appellate court affirmed, holding that:

8 "the rate determinations made by the director were not  
9 required to be filed with the secretary of State nor  
published in the California Administrative Code or  
Register since they come within the provisions of  
10 [former version of section 11340.9(g)], which excepts  
from such filing any regulation establishing or fixing  
11 rates, prices or tariffs."

12 Id. at 686. Setzer is distinguishable. First, Setzer involved  
13 fixing rates, which expressly falls within the ambit of section  
14 11340.9(g).<sup>14</sup> Moreover, the type of charge involved was a rate  
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16 <sup>13</sup> See California Ass'n of Nursing Homes, Sanitariums, Rest Homes for Aged, Inc. v. Williams, 4 Cal. App. 3d 800 (1970)  
17 (concluding that regulation establishing reimbursement rates for MediCal patients in nursing homes did not fall within "rates, prices or tariffs" exception even though it set "rates" because in the authorizing statutes, the scope of the agency's regulations was broader than the exemption); State Compensation Ins. Fund v. McConnell, 46 Cal. 2d 330 (1956) (rating plan for workers' compensation insurance premium fixed by insurance commissioner fell within "rates, prices and tariffs" exception to the APA); Winzler & Kelly v. Department of Industrial Relations, 121 Cal. App. 3d 120, 128 (1981) (determination that field surveyors were covered by wage and hour laws was integral to wage rate-setting and thus exempt from the APA as a regulation fixing rates, prices or tariffs).

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24 <sup>14</sup> Defendants also rely on two opinions by the California Attorney General, 66 Ops. Cal. Atty. Gen. 505 (1983). That opinion held that the Department of Developmental Services could establish a "parental fee schedule" for services provided to developmentally disabled children without complying with the APA. However, the court disagrees with the Attorney General's conclusion that "there appears little doubt but that a parental fee schedule sets 'rates' in common parlance." 66 Ops. Cal. Atty. (continued...)

1 charged for a service, i.e., maintenance of the committed person  
2 at the mental hospital. Here, the fee does is not charged for a  
3 service but for a government privilege, i.e., the right to erect  
4 a billboard along a highway. It did not involve a regulatory  
5 permit.

6 Finally, defendants argue that the language of California  
7 Business and Professions Code section 5485 reveals legislative  
8 intent to exempt the fee setting from the APA. Specifically  
9 defendants note that the statute itself establishes a "process"  
10 by setting a maximum fee of \$100.00, limiting the fee to the  
11 reasonably necessary to recover the cost of providing the service  
12 or enforcing the regulations for which the fee is charged, and  
13 providing that the fee can include indirect costs of  
14 administering the program. See Cal. Bus. & Prof. Code § 5485.  
15 The court disagrees that the statutory language can be  
16 interpreted to indicate legislative intent to exempt the fee  
17 setting from the APA. The APA applies broadly to agency  
18 regulations. Tidewater Marine Western, Inc. v. Bradshaw, 14  
19 Cal.4th 557, 570 (1996). Specifically the APA provides that

20 [n ]o state agency shall issue, utilize, enforce, or  
21 attempt to enforce any guideline, criterion, bulletin,  
22 manual, instruction, order, standard of general  
23 application, or other rule, which is a regulation ....,  
24 unless the guideline, criterion, bulletin, manual,  
25 instruction, order, standard of general application, or  
26 other rule has been adopted as a regulation and filed

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27 <sup>14</sup> (...continued)

28 Gen. 505. Moreover, the Attorney General's opinion is  
distinguishable in that, like Setzer, it involved a government  
service, specifically, services for developmentally disabled  
children, and not a regulatory permit. 66 67 Ops. Cal. Atty.  
Gen. 50.

1 with the Secretary of State pursuant to this chapter.  
2 Cal Gov't Code, § 11340.5(a). Moreover, the APA provides that  
3 its provisions "shall not be superseded or modified by any  
4 subsequent legislation except to the extent that the legislation  
5 shall do so expressly." Cal. Gov't Code, § 11346. The  
6 limitations on the permit fee contained in section 5485 do not  
7 constitute an express exemption from the APA.<sup>15</sup> Thus, the APA  
8 applies.

9 **CONCLUSION**

10 For the foregoing reasons, plaintiffs' motion for partial  
11 summary judgment is granted and defendants' motion for partial  
12 summary judgment is denied.

13 IT IS SO ORDERED.

14 DATED: August 29, 2005

15 /s/ Frank C. Damrell Jr.

16 FRANK C. DAMRELL, Jr.

17 UNITED STATES DISTRICT JUDGE

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23 <sup>15</sup> In Alta Bates Hospital v. Lackner, 118 Cal. App. 3d  
614, the appellate court confronted a challenge to a 10% cutback  
24 in MediCal reimbursement rates instituted by the director of the  
Department of Health Services. The cutback was instituted  
25 pursuant to a state statute authorizing the director to make  
emergency cutbacks when it appeared that there would be a budget  
shortfall. See Cal. Welf. & Inst. Code § 14120. The court  
26 determined that the legislature did not intend for the director  
27 to comply with the APA because the cutback would be implemented  
only in specific, emergency situations, and the delay attendant  
28 to complying with the APA would undermine the efficacy of the  
statute. No parallel exigency is present here.